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of his sentence. With this modification of sentence I would dismiss the appeals.

KHAJA MOHAMAD NOOR, J.—I entirely agree.

Appeal dismissed.

MACPHERSON, J.

REVISIONAL CIVIL.

Before Courtney Terrell, C. J. and Varma, J.

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March, 5, 6, 16.

MAKHU SAHU

v.

KAMTA PRASAD SAHU.*

Code of Civil Procedure, 1908 (*Act V of* 1908), *Order XLI, rule* 11—"*summary dismissal*" *of appeal, whether should be supported by judgment—rule* 31, *applicability of—appeals from original decrees or orders, whether liable to dismissal under rule* 11—*revision by High Court—test.*

A simple order of dismissal of an appeal under Order XLI, rule 11, Code of Civil Procedure, 1908, need not be supported by a "judgment" and it is not until after admission and after hearing that a judgment under rule 31 is required.

Samin Hasan v. *Piran*(1), and *Tanaji Dayde* v. *Shankar Sakharam*(2), followed.

Rami Deka v. *Brojo Nath Saikia*(3), *Surendra Nath Some* v. *Raghunath Dutt*(4), *Altap Ali* v. *Jamsur Ali*(5), *Hari Dasi Devi* v. *Gadadhar Roy*(6), *Durga Thathera* v. *Narain Thathera*(7) and *Ma Saw* v. *Ma. Bwin Byu*(8), dissented from.

* Civil Revision no. 622 of 1933, against a decision of Rai Bahadur Ram Chandra Chaudhuri, District Judge of Shahabad, dated the 30th August, 1933.

(1) (1908) I. L. R. 30 All. 319.
(2) (1911) I. L. R. 36 Bom. 116.
(3) (1897) I. L. R. 25 Cal. 97.
(4) (1923) 27 Cal. W. N. 501.
(5) (1926) 30 Cal. W. N. 334.
(6) (1926) 42 Cal. L. J. 499.
(7) (1931) A. I. R. (All.) 597, F. B.
(8) (1926) I. L. R. 4 Ran. 66.

There is no appeal from an order of dismissal under rule 11 and in dealing with such an order in revision the High Court should merely examine the matters presented to the lower appellate court on the application for admission and see whether or not the High Court would have acted in the same manner.

Under the Code of Civil Procedure all appeals, whether from original or appellate decrees, may be subjected to the preliminary test of admission and appeals from original decrees or orders are as liable to summary dismissal as are appeals from appellate decrees or orders. It is merely a matter of practice with the High Court that first appeals are admitted as a matter of course.

Application in revision by the judgment-debtors.

The facts of the case material to this report are stated in the judgment of Courtney Terrell, C. J.

Harinandan Singh, for the petitioners.

Anand Prasad, for the opposite party.

COURTNEY TERRELL, C. J.—This is a petition for the revision of an order of the District Judge of Shahabad dismissing under Order XLI, rule 11, of the Code of Civil Procedure an appeal in an execution case. There is no doubt that the order was right on the merits but the question before us is whether the learned Judge was right in recording the order in the form "summarily dismissed" or whether he should have delivered a "judgment" setting forth the reasons for his decision. There has been some conflict between the decisions of the various High Courts on this point.

Order XLI, rule 11, is as follows:—

"(1) The appellate Court, after sending for the record if it thinks fit so to do, and after fixing a day for hearing the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving notice on the respondent or his pleader.

(2) If on the day fixed or any other day to which the hearing may be adjourned the appellant does not appear when the appeal is called on for hearing, the Court may make an order that the appeal be dismissed.

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(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred."

It corresponds with section 511 of the old Code but in the first paragraph of the rule the words " after sending for the record if it thinks fit to do so " are new and the words in the old Code " the appeal may be dismissed for default " have been replaced by the words " the court may make an order that the appeal be dismissed ". There is thus no appeal from an order made under the rule.

Order XLI, rule 31, is as follows:—

" The judgment of the appellate court shall be in writing and shall state—

(a) the points for determination;

(b) the decision thereon;

(c) the reasons for the decision; and,

(d) where the decree appealed from is reversed or varied the relief to which the appellant is entitled;

and shall at the time that it is pronounced be signed and dated by the Judge or by the Judges concurring therein."

The contention accepted by some High Courts has been that an order under rule 11 must be justified by a " judgment " under rule 31. It is worthy of notice that there is a difference between a " judgment " and a " decree " or " order " which is indicated in section 2 of the Code itself for by the definitions

" (9) ' judgment ' means the statement given by the Judge of the grounds of a decree or order,

(2) ' decree ' means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plaint and the determination of any question within section 47 or section 144, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default,

and

(14) ' order ' means the formal expression of any decision of a Civil Court which is not a decree."

It may further be noted that appeals are always from "decrees" or "orders" and not from "judgments" for it frequently happens that the order appealed from is right though the judgment by which it is supported is erroneous. Order XLI prescribes the procedure in dealing with appeals. Before an appeal is heard and adjudicated upon it must first be "admitted". Rules 9 to 15 inclusive deal with the procedure on admission of an appeal. Rules 16 to 29 inclusive deal with the procedure on the hearing of an appeal which has been admitted under the preceding rules. Rules 30 to 34 inclusive deal with the judgment to be delivered after hearing. Rules 35 to 37 inclusive deal with the decree which has to be drawn up in pursuance of the judgment of the Court and under section 142

"All orders and notices served on or given to any person under the provisions of this Code shall be in writing."

By Order XX, rule 3,

"The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review."

Some High Courts have directed that certain orders including orders dismissing an appeal under Order XLI, rule 11, shall be supported by a "judgment". But such is not the case in this province. In *Rami Deka* v. *Brojo Nath Saikia*(1) decided under the old Code two Judges of the Bengal High Court decided that an order dismissing an appeal under section 551 should be supported by a judgment setting forth the grounds of the decision. The learned Judges are not reported as having given any reasons for their decision. Nevertheless this case seems to be the origin of the practice in Bengal which has since been followed. In 1908 also under the old Code a contrary opinion was expressed by two Judges of the Allahabad High Court in *Samin Hasan* v. *Piran*(2) which expressly dissented from the Calcutta opinion referred to

(1) (1897) I. L. R. 25 Cal. 97.
(2) (1908) I. L. R. 30 All. 319.

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above. In 1912 in *Tanaji Dagde* v. *Shankar Sakharam*(1) under the modern Code an appeal was summarily dismissed under Order XLI, rule 11. The Bombay High Court dealt with the question as to whether a judgment setting forth the reasons was required. Relying upon the order in which the various matters are dealt with in Order XLI they pointed out that the requirements of rules 30 and 31 as to judgments referred only to regular hearings at which issues are raised in the presence of the parties with the record before the court and that it was never intended by the legislature that judgments should be required save after regular hearing so conducted. In my opinion this decision was correct.

The decision in 1913 was considered by a Full Bench of the Bombay High Court in *Hanmant Valad Rakhmaji* v. *Annaji Hanmanta*(2). It appears to have been the fact that in the year 1890 the High Court of Bombay acting under its powers had issued a distinct direction to the lower courts that when dismissing an appeal under section 551 of the old Code a judgment should be written. The Court in the case of *Tanaji Dagde* v. *Shankar Sakharam*(1) seems to have been ignorant of the fact of this direction having been given and the Full Bench decided that the new Code had not abrogated the direction given by the Bombay High Court. It was therefore held that in the Bombay Presidency an order of dismissal under Order XLI, rule 11, must be supported by a judgment giving grounds for the decision.

A Full Bench of the Allahabad High Court in *Durga Thathera* v. *Narain Thathera*(3) reconsidered the former decision of the same Court in the case of *Samin Hasan* v. *Piran*(4) and decided that rule 31 was applicable to cases of dismissal under rule 11. With

(1) (1912) I. L. R. 36 Bom. 116.
(2) (1913) I. L. R. 37 Bom. 610, F. B.
(3) (1931) A. I. R. (All.) 597, F.B.
(4) (1908) I. L. R. 30 All. 319.

the greatest respect I am entirely unable to agree with the reasoning of the learned Judges and it seems to me that the court ignored the distinction between a judgment on the one hand and a decree or order on the other. It is said " There can be no question that in dismissing an appeal under Order XLI, rule 11, the appellate Court delivers a judgment, in accordance with which the decree is prepared ". This premise which is the basis of the decision is, to my mind, erroneous. Moreover, in my opinion, the Court makes a mistake in setting forth a further false premise. It is said " If rule 31 were not to apply to judgments delivered under Order XLI, rule 11, the necessary result would be that there would be no provision of law which would require such judgments to be in writing or to be signed and dated by the Judge. A judgment under Order XLI, rule 11, could then be pronounced orally. This could not possibly have been intended by the legislature ". I think the Court forgot section 142 under which orders and notices must be in writing. Furthermore the Court disapproved of the reasoning in *Samin Hasan* v. *Piran*(1) based upon the order in which the various matters dealt with under Order XLI are grouped and said that the grouping cannot be relied upon to control the effect of the provision. But in this case the grouping is strictly in accord with the proper classification of the different stages of procedure. A simple order of dismissal may be passed if the appeal is not admitted and it is not until after admission and after hearing that a judgment is required.

The circumstances of the Bombay Full Bench decision were re-produced in Rangoon in the case of *Ma Saw* v. *Ma. Bwin Byu*(2) before a single Judge of that Court. The learned Judge it is true based his decision partly upon the view of the Calcutta High Court and disagreed with the decision in *Samin Hasan* v. *Piran*(1). Nevertheless the main ground of

(1) (1908) I. L. R. 30 All. 319.
(2) (1926) I. L. R. 4 Ran. 66.

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his judgment was the fact that as in the Bombay Full Bench case the District Judges of Burma had been directed to write judgments when dismissing appeals under Order XLI, rule 11, and, in my opinion, the judgment of the learned Judge while sound on this point has the defects of the decisions in the Allahabad Full Bench case and the Calcutta decision and is erroneous.

A series of decisions of the Calcutta High Court, *Surendra Nath Some* v. *Raghunath Dutt*(1); *Altaf Ali* v. *Jamsur Ali*(2); *Hari Dasi Devi* v. *Gadadhar Roy*(3), treat the matter as one not admitting of further discussion the practice being well settled for that Court. I am, however, unable to agree with the views therein expressed.

In so far as the courts in this province are concerned there is so far as I know no practice of requiring lower appellate courts to write judgments in support of orders under Order XLI, rule 11. There is no appeal from such orders and in dealing with such an order under a petition for revision the High Court should merely examine the matter presented to the lower appellate court on the application for admission and see whether or not it (the High Court) would have acted in the same manner. It is a matter of common knowledge that the High Court itself never gives any judgment or reasons in support of its order that such an application for admission be allowed or dismissed.

I may in conclusion state that it is merely a matter of practice with this court that first appeals are admitted as a matter of course. Under the Civil Procedure Code all appeals whether from original or appellate decrees may be subjected to the preliminary test of admission and original appeals are as liable

(1) (1920) 27 Cal. W. N. 501.
(2) (1925) 30 Cal. W. N. 334.
(3) (1926) 42 Cal. L. J. 499.

to summary dismissal as are appeals from appellate orders.

I would dismiss this petition with costs.

VARMA, J.—I agree.

Rule discharged.

FULL BENCH.

Before Courtney Terrell, C.J., Khaja Mohamad Noor and Varma, JJ.

MURLI MANOHAR PRASAD

v.

KING-EMPEROR.*

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March. 12, 13, 19.

Press (Emergency Powers) Act, 1931 (Act XXIII of 1931), sections 4(1), 7, 23 and 30—District Magistrate exercising functions under the Act, whether is a "Court"—Orders of District Magistrate, whether subject to appeal or revision—High Court—limited powers of interference—sections 23 and 30—Government of India Act (5 and 6 Geo. V. c. 61), section 107, applicability of.

The District Magistrate, when dealing with the Press (Emergency Powers) Act, 1931, or other similar Acts, is not a Court but an executive officer carrying out the functions on behalf of the executive Government and as such is not subject to the appellate jurisdiction of the High Court. That being so, the High Court has no jurisdiction under section 107 of the Government of India Act to interfere with the orders of the District Magistrate passed under the Press Act.

The powers of the High Court to interfere with the orders passed under that Act are restricted by sections 23 and 30 for the limited purpose of deciding whether the publication or article does or does not come within the purview of section 4(1) of the Act.

KHAJA MOHAMAD NOOR, J.—The petitioner Murli Manohar Prasad asks us to revise an order of the District Magistrate of Patna calling upon him to furnish security under the following circumstances.

* Miscellaneous Judicial Case no. 12 of 1933.